

**Franklin Iron & Metal Corp. and Ronald L. Hill
and John Gunter.** Cases 9-CA-30457-1 and 9-
CA-30457-2

December 16, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On August 3, 1994, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

In challenging the judge's crediting of Charging Party Hill's testimony, the Respondent points out that Hill is a convicted felon. Our review of the transcript reveals that during cross-examination Hill admitted having pled guilty, within the previous 10 years, to the felony of carrying a concealed weapon. While the judge does not refer to Hill's conviction in his decision, he acknowledged on the record the relevance of such conduct for purposes of impeachment under Rule 609 of the Federal Rules of Evidence, and presumably took it into account in assessing Hill's credibility. We note further that Hill's testimony is in substantial part corroborated by Charging Party Gunter. Thus, we find that the evidence of Hill's felony record provides no basis for reversing the judge's reliance on Hill's testimony.

The Respondent also excepted to the judge's decision on the basis that it is the product of bias and prejudice. Our review of the entire record in this proceeding reveals no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated either bias toward the Charging Parties or prejudice against the Respondent in his analysis or discussion of the evidence.

² We deny the Respondent's motion to supplement the record with time records for Charging Parties Hill and Gunter covering a period of several months during 1992. While it appears from the record that these documents were offered into evidence during the hearing, the Respondent neglected either to provide copies to the reporter for inclusion in the record or subsequently to submit them to the judge prior to the issuance of his decision. It would be inappropriate in these circumstances for the Board to consider evidence that was not available to the judge. In any event, these documents pertain to an allegation of the complaint that is not in issue before the Board, i.e., that the Respondent unlawfully reduced the Charging Parties' hours of work. Inasmuch as the judge dismissed this allegation and neither the General Counsel nor the Charging Party has filed exceptions thereto, the matter is moot.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Franklin Iron & Metal Corp., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

We also deny the Respondent's motion to admit into the record certain internal company memoranda that were appended to its brief in support of exceptions. The Respondent made no attempt during the hearing to introduce these documents and there is no suggestion that they were unavailable to the Respondent at that time.

David Ness, Esq., for the General Counsel.

Mark R. Chilson, Esq., of Dayton, Ohio, for the Respondent.

John J. Heron, Esq., of Dayton, Ohio, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. On charges filed by Ronald L. Hill and John Gunter on March 4, 1993, and amended charges filed by them on March 26, 1993, the Regional Director for Region 9 of the National Labor Relations Board (the Board) issued a consolidated complaint on April 15, 1993, alleging that Franklin Iron & Metal Corp. (the Respondent) committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Dayton, Ohio, on August 9 and 10, 1993, at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the parties have been given due consideration. On the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a corporation engaged in the operation of a scrap metal yard and recycling center at Dayton, Ohio. During the 12-month period preceding April 1993, the Respondent, in the course and conduct of its business operations, sold and shipped from its Dayton, Ohio facility goods valued in excess of \$50,000 directly to points outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Rules Prohibiting Discussion of Wages and Unions

Charging Parties Hill and Gunter were employed by the Respondent as truckdrivers and picked up containers of scrap metal from customers at various locations and delivered them to its yard. Hill testified that when he was hired in September 1989 he was told by Harold Edelman, the plant manager at the time and the brother of Company President Jack

Edelman, that there was to be no discussion of wages or union activity among the employees and that violation of these rules could lead to termination. He also testified that when he was given a wage increase in June 1992, current Plant Manager Donald Stamp told him to keep it to himself because not everyone got the same type of raise. Gunter testified that when he was hired in August 1987 Harold Edelman told him not to discuss how much he was paid and not to discuss unions "because it wasn't a union company." During August 1992, when he questioned Stamp about a less senior driver receiving a higher wage rate than his, Gunter asked why the drivers were not allowed to discuss their wages and why wage rates were not posted. Stamp answered that it was "their policy" not to post wage rates or to allow the drivers to discuss their wages.

Stamp, the only company official to testify at the hearing, said that the Respondent did not have any rules prohibiting employees from discussing unions and that in his over 12 years with the Company no employee had ever been disciplined for discussing unions. He testified that no employee had ever been counseled or warned for discussing wages and he denied saying anything about discussing wages to Hill or Gunter in June 1992 or thereafter. On cross-examination, he was asked to give an example of the rules and regulations that he said were read to employees when they were hired and he answered: "The first one off is employee's wages are to be kept personal with management." He went on to say: "All we asked is that they would be kept personal—between management and themselves." He also said that he had observed employees talking about wages among themselves and had taken no action.

Analysis and Conclusions

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining oral rules prohibiting employees from discussing their wage rates with other employees and prohibiting them from engaging in union activities. In its brief the Respondent argues that there is no evidence that such rules existed and that Stamp's testimony establishes that they did not. I find that the credible testimony of Hill and Gunter as to what they were told when they were hired establishes that these rules did in fact exist. Even if it were credited, Stamp's testimony that no one had been disciplined for violating these rules during his tenure with the Respondent does not prove that the rules did not exist. His contradictory testimony that there was no rule prohibiting employees from discussing their wages but that they were "to be kept personal with management" indicates such a rule was in force and serves to undermine his credibility. I find that the Respondent did have an oral rule prohibiting its employees from discussing their wages among themselves and that the Respondent did not establish any business justification for such a rule. I also find that the evidence establishes that it had a rule prohibiting employees from discussing unions punishable by termination, which in effect prohibited them from engaging in union activity.

It makes no difference whether the employees were "asked" not to discuss their wage rates or ordered not to do so. Nor does it matter if the rule was unenforced or unheeded. In the absence of any business justification for the rule, it was an unlawful restraint on the rights protected by Section 7 of the Act and violated Section 8(a)(1). *Radisson*

Plaza Minneapolis, 307 NLRB 94 (1992); *Waco, Inc.*, 273 NLRB 746 (1984). The Respondent presented no evidence of a legitimate business purpose for its rule against talking about unions. Maintaining that rule also violated Section 8(a)(1). *Columbus Mills*, 303 NLRB 223, 229 (1991); *Cave Springs Theatre*, 287 NLRB 4, 8 (1987).

B. Other Allegations

On August 6, 1992,¹ while at a recycling plant, Hill and Gunter encountered and had a conversation with Randy Locks, who was formerly employed by the Respondent as a truckdriver. During the course of the conversation Locks mentioned that he was being paid \$10 an hour in his new job and that he had been paid \$8 an hour when employed by the Respondent. A short time later Hill and Gunter returned to the Respondent's yard and discussed what Locks had told them and the fact that neither of them was making as much as \$8 an hour although both had been employed by the Respondent longer than Locks had been. Both Hill and Gunter are African-Americans and Locks is white. They discussed the possibility that the pay discrepancy was racially motivated and decided that they would speak to Stamp about it at the end of the workday.

A short time later Stamp rode up on a bicycle and Gunter got out of his truck and asked to speak with him. As he put his bicycle aside Gunter walked over to him, about 15 feet away from Hill, and began speaking to Stamp about wage discrimination. He testified that he did so rather than waiting until the end of the workday, as he had discussed with Hill, because he was upset and wanted to talk to Stamp right away. Gunter told Stamp that he knew that some drivers who had been there less time than he had were getting more per hour than he was. Stamp replied that he knew that things were not particularly right and that he was going to talk to Jack Edelman about them. Hill left the yard shortly after Gunter began speaking to Stamp. An hour or two later Hill spoke with Stamp in the yard. Hill asked why, if all employees were doing the same job, one who had been there less time was being paid more than someone who had been there longer. Stamp's first response was: "Oh God, I think you been talking to John." Hill replied that Gunter had been present when he learned about the wage discrepancy and that they were going to speak to him together. Stamp told him that some drivers who had been there less time had threatened to quit and they had been given more money in order to keep them and avoid having to hire and train new drivers. Stamp said that he would speak to the company president and see if he could get Hill's and Gunter's wages increased. He also said that Gunter had said that he felt their wage discrepancy was racially motivated and he wanted Hill to know that he was not prejudiced and that Hill should not feel that way.

As they were clocking out that evening, Hill and Gunter discussed their conversations with Stamp in which he promised to speak to Edelman and they decided to wait and see what Edelman would do. When nothing happened, in early September after Hill returned from vacation, he met with Gunter at a restaurant where they discussed the possibility of filing a complaint with the Ohio Civil Rights Commission (OCRC). Hill called and made an appointment for himself

¹ Hereinafter all dates are in 1992.

and Gunter to meet with an OCRC investigator. October 9, the date of their appointment was a workday. Hill told dispatcher Don Beaumire that he had to take his wife to the doctor that morning and Gunter told Beaumire that he would be late because he had to see a lawyer. Hill and Gunter met with the OCRC investigator and both signed and filed almost identically worded charges accusing their employer of wage discrimination based on race.² They drove to work separately but arrived at the yard together between 10 and 11 a.m.

Hill testified that on the evening of Friday, October 23, when he was parking his truck Stamp told him to shave. When he came to work on Monday, October 26, he was not dispatched and was told he had to report to Stamp. Stamp told him that he had not shaved and that he was being sent home to do so. Hill responded that he has trouble shaving frequently because it irritated his face. Stamp said he knew about that but that he still had to go home and shave. Hill said that wasn't fair because another driver who was unshaven had been dispatched that morning. Stamp said he wasn't concerned about that at the moment, that he wanted Hill to go home and shave, and that when he did he could return to work. Hill left, returned after shaving, and was paid only for the time he actually worked that day. On Wednesday, October 28, Hill was called to the office of Company President Edelman where General Manager Greg Clouts was also present. When Stamp arrived Edelman sent him to get Hill's personnel file. This meeting lasted about an hour and a half during which Edelman told Hill he was being "a wise-ass" by taking several hours to go home and shave the previous Monday. Hill said that he was upset at being sent home to shave and had stopped to have breakfast. Edelman told him he did not like his attitude, that he had been "trouble" since he had been there and that he should have been terminated long ago. When Hill disputed this and said he had been praised for being a good employee, Edelman repeated that he had been "trouble from day one" and said he had a bad attitude. Stamp came in with his personnel file and when Edelman opened it Hill saw a copy of his OCRC charge in the file. Edelman began reading off a series of pink slips in the file relating to instances where Hill had been told to shave, had come to work without boots or out of uniform, or had called in sick. When Hill said that they all involved minor things, Edelman said that they were important and that Hill had a bad attitude which had to change or he would be terminated. Hill told Edelman that he was being unfair and that he felt he was a good employee. Edelman again told Hill that he had a bad attitude that had to change or he would be terminated and that he was tired of the "penny-ante stuff" like not shaving and said: "I know what you guys are up to and I'm not going to tolerate this type of stuff." After Edelman again told Hill he had to change his attitude or he would be terminated the meeting ended. Hill testified that he had never seen any of the pink slips before and that he had never before been called into the office and threatened with termination.

Gunter testified that on Friday, October 30, at the end of the workday he was told by a secretary that he had to go to Edelman's office in order to get his paycheck, which had never happened before. When he got there Edelman and

Stamp were present. When he entered the office Edelman asked him if he had a tape recorder. Gunter said he did and Edelman told him to take it out of his pocket. Gunter said he would not and that he would tape their conversation. Edelman told Gunter that he knew about the charges that had been filed and that Gunter had been "trouble" since he had been there. He then asked why Gunter had taken so long to get to a customer in Franklin, Ohio, earlier that day. Gunter responded that it was due to highway construction delays. Edelman told him not to bring a tape recorder to work and, if he did so, he wasn't to clock in. He got his check and the meeting ended. Gunter testified that he had brought the tape recorder with him to protect himself because Hill had told him about being called in to see Edelman previously that week. He said the recorder failed to record the conversation.

On Saturday, October 31, at the end of the workday, as they were going to clock out, Hill and Gunter encountered Supervisor Paul Naves who told them that they had better watch themselves because the Company was "gunning" for them. Later, in the locker room, they had a conversation with Naves in which they talked about Gunter being called into Edelman's office on Friday. Naves said that they had "better be careful," that he had heard about the charges they had filed, and that he had been told by the Company not to say anything to them. When Hill said he wasn't surprised because other supervisors were not speaking to him and Gunter, Naves said: "All I can say to you guys really is you better watch yourself because, you know, you're going up against the company and you better protect your ass."

Hill testified that on Wednesday, November 4, he arrived at work at 6 a.m. but was not dispatched and was told he had to see Stamp. He went to Stamp's office at 7:30 a.m. and asked Stamp, "What have I done now?" Stamp responded: "It's your attitude, ever since you and John have filed these charges, your work and your attitude have been poor." Stamp then asked him why he had left a loaded container at OSMI. Hill responded that he was not informed that the container needed to be picked up. OSMI was a customer in Springfield, Ohio, that Hill regularly served. He testified that he normally picked up four or five loads of scrap metal each weekday and one or two loads on Saturdays. On Tuesday, November 3, he picked up four loads and did not return for a fifth because he had checked the container and it was less than half full. Usually, that meant it would not be filled overnight and did not need to be emptied unless there was going to be a heavy volume of scrap generated that night, in which case a OSMI supervisor would so advise him. Noone told him that it needed to be emptied that day. Stamp told him that OSMI had called the previous evening and complained that Hill had been told to return for the fifth container and did not do so. He said that the call came in during a supervisors meeting and that Edelman wanted Hill terminated. Hill told Stamp that Noone had told him that the container needed to be emptied. Stamp responded that 6 months ago he might have believed him, but because of all that had been going on and since he and Gunter had filed charges, he could not accept Hill's word. He told Hill he was being laid off until he found out what had happened. Hill left and drove to OSMI where he confronted the supervisor who was responsible for telling him if another run was necessary. He then called the OCRC investigator, told him what had happened, and went to the office to sign another charge. After

²The only differences in the wording of their charges concerned their dates of hire.

he returned home, he was called by Stamp who told him to come in to talk to him. When he arrived at the yard, Stamp told him he had talked to OSMI and knew that Hill had not been told to return for a fifth load and that he was putting him back to work but because he did not have his work clothes with him, he would be paid for the time up until he had been called at home. When Hill said that he had told Stamp that he had not been told about a fifth load, Stamp repeated that 6 months ago he would probably have believed him but not since "this thing with you, John and the company." Stamp also told him that he was being taken off the OSMI run because he did not want any "animosity" between Hill and the people at OSMI. From that time on he was not sent to OSMI and was assigned other runs which he considered less desirable in that they were shorter, more frequent, and required physical labor such as sweeping, shoveling and climbing on the containers which the OSMI runs did not. He testified that he was brought in later and sent home earlier than he had when he made the OSMI runs. On November 12 and 13 he called in sick and on November 14 he resigned his employment. Clouts asked him to sign a letter of resignation in which he stated that he was leaving for a new position. Hill said that he agreed to sign the letter but told Clouts that was not the only reason and it was also because of the harassment he had received since filing charges. Hill testified that he felt humiliated by being taken off the OSMI run and given jobs he felt should have been given to new employees.

Gunter testified that on Monday, November 2, he was called to Stamp's office. When he arrived Stamp told him that he had been told to tell him he was not to have his tape recorder "on company time on company property," and asked if he would abide by that. Gunter said that he would and went out and put his tape recorder in his van. On November 4, after speaking with Hill he returned to the OCRC and signed an additional charge. Gunter testified that about a week after he was called in and spoken to by Edelman he was talking to driver Steve Moore near the scales at the First Street Recycling Center. He showed Moore a copy of the charge he had filed with the OCRC and explained why he had done so. About an hour later he was called to Stamp's office. When he arrived, Stamp said that he had been told by Bruce Patterson, the operator of the First Street Recycling Center, that Gunter and Moore had been talking about unions and that he had seen Gunter showing Moore some papers. Stamp said: "You know how Jack [Edelman] goes crazy about unions." Stamp then asked him if he was talking to Moore about unions. Gunter said that he was not and was showing Moore a brochure about a credit card he had been received. Gunter testified that during the last few weeks he was employed by the Respondent he noticed his hours were being reduced and several times a week he was being brought in an hour or sometimes two later than his normal 6:30 a.m. starting time while other less senior drivers continued to start at 6:30. He also testified that he was being assigned less desirable runs and was given trash detail 3 or 4 times instead of the usual once a month or every other month. Gunter testified that on November 24 he resigned from his employment with the Respondent because he felt he was under a lot of stress as a result of his hours being cut, being called into the office by Stamp, and getting less desirable runs. When he resigned he told Stamp that he had

bought his own truck because he did not want the Respondent to know he would be unemployed, but in fact he had not done so.

Counsel for the General Counsel and the Charging Parties contend that the Respondent violated Section 8(a)(1) of the Act by threatening and retaliating against Hill and Gunter because they engaged in protected concerted activities when they complained of possible race discrimination relating to a higher wage rate being paid to a less senior white driver and when they filed charges with the OCRC and that its unlawful actions resulted in the constructive discharge of both Hill and Gunter. The Respondent contends that Hill and Gunter were not engaged in concerted activity as their complaints to it and to OCRC were made as individuals and sought only to redress their individual concerns, that their actions were not protected by the Act, and that they were not constructively discharged.

1. Concerted activity

The standard for determining whether an employee's activity is concerted is found in the Board's decision in *Meyers Industries*, 281 NLRB 882, 88 (1986), where, on remand, it reaffirmed the definition set forth in its prior decision in that case, *Meyers Industries*, 268 NLRB 493, 497 (1984), that it must "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The credible and uncontradicted testimony of Hill and Gunter establishes that, on August 6, immediately after being told by a former employee, who was white and less senior, that he had been receiving a higher wage rate while employed by the Respondent, they discussed what they had been told, speculated that the wage discrepancy may have been "racially motivated," and decided to approach Plant Manager Stamp about the matter that evening. This consultation and planning to take action in their mutual interest rendered the complaints they subsequently voiced to Stamp that evening concerted notwithstanding the fact that they spoke to him separately. *Adelphi Institute*, 287 NLRB 1073 (1988); *Daly Park Nursing Home*, 287 NLRB 710, 711 (1987). Likewise, the complaints they filed with the OCRC constituted concerted activity although each filed separate complaints. After failing to receive the response which both were promised by Stamp on August 6 and which they had agreed to await before taking further action, in September, they met at a restaurant and discussed going to the OCRC. Thereafter, they made a joint appointment with an OCRC investigator on October 9 and filed nearly identical complaints asserting racial discrimination by the Respondent in setting their wage rates. Their OCRC complaints were the product of their consultation and joint effort to address what they considered discrimination and constituted concerted activity.

Whether or not their concerted activity was protected depends on whether the employer knew or reasonably should have known that Hill and Gunter were acting concertedly. *Nicola's*, 299 NLRB 860, 862-863 (1990); *New England Fish Co.*, 212 NLRB 306, 311 (1974). The Respondent contends that when Hill and Gunter separately approached Stamp an hour or 2 apart on August 6 they spoke only in terms of their own individual situations and did not act concertedly. The evidence does not support its argument. The credible testimony of Hill was that when he spoke to Stamp shortly after Gunter had done so, as soon as he asked about

employees being paid more than others with longer service, Stamp responded, "Oh, God I think you been talking to John." Hill told him that he had been talking to John, that they learned of the wage discrepancy while together, and that they had agreed to speak to Stamp about it together but Gunter had "jumped the gun" and talked to Stamp by himself. Stamp gave Hill the same explanation he had given Gunter, that sometimes a driver threatens to quit for another job the Respondent offered to match the pay at the other job in order to keep them from leaving. He also promised Hill that he would speak to Edelman about a wage increase for both Hill and Gunter. Stamp did not deny any making the comments and statements attributed to him by Hill. The Respondent also argues that the actions of Hill and Gunter on August 6 were not concerted or protected in that neither specifically asked Stamp for a pay increase and their comments to him simply amounted to unprotected griping and complaining. Whatever their actual words might have been, the evidence is clear that Hill and Gunter told Stamp that they felt they were being discriminated against by being paid less than a less senior white driver had been paid and that Stamp understood that they wanted the situation rectified as he told Hill that he would talk to Edelman about getting them a wage increase. I find that the actions of Hill and Gunter on August 6 were protected concerted activities within the meaning of the Act.

The Respondent also contends that the charges Hill and Gunter filed with the OCRC can only be characterized as individual complaining. I do not agree. These complaints were the product of their consultation and agreement on a plan of action. The charges, alleging racial discrimination and seeking redress from an agency of the State of Ohio, arising from the same set of circumstances, a less senior white employees receiving a higher wage rate, and seeking the same relief, involve more than individual complaining and were the direct result of their joint action at the same time and place. There is no rational basis on which to conclude that because there were two charges filed instead of one their actions were not concerted or protected. The fact that the charges were almost identical, were filed on the same date, and followed their unsuccessful efforts to resolve the same matter with Stamp put the Respondent on notice they were acting in concert.³

I find there is no merit in the Respondent's contention that the filing of these charges by Hill and Gunter was not protected because their absence from work for a few hours on the day they were filed disturbed the efficient operation of the company's business. The evidence establishes that each requested time off in advance which, from all that appears, was granted. While their purpose in requesting the time off differed from the reasons they gave (to see a lawyer and take one's spouse to a doctor), it was no less lawful or meritorious. The Respondent offered no evidence to establish that their taking time off that day was not approved in advance or had caused any disruption of its business. On cross-examination, when Stamp was asked about memos that he had put in the personnel files of Hill and Gunter concerning their late arrivals on October 9, he testified that "it was a problem be-

cause it was short notice." However, he failed to state what the "problem" was or to describe what, if any, disruption resulted. The memo in Hill's file does state that he did not request time off until the previous evening and says that he was told in the future he "must try to give better notice in advance to have time off." The memo in Gunter's file notes only that he had requested time off to see a lawyer. Neither suggests that their arriving for work late on that morning pursuant to previously requested and approved time off caused any disruption of the Respondent's business that day. Consequently, I find there is nothing to establish that their taking off from work in order to file charges with the OCRC caused any detriment to the Respondent's business or rendered their actions unprotected. If anything, these memos and Stamp's testimony concerning them offer additional proof that he was aware that they were engaged in concerted activity. On the memo in Gunter's file, which refers to his arrival at work at 11:30 a.m. after telling Don Beaumire that he was going to see a lawyer, Stamp wrote: "He came in with Ron Hill." When asked why he made this notation, Stamp testified:

The fact that they both came to Don in short notice to do the same type of thing timewise and also they show up back together, you know, it looked to him as if they were out doing something together instead of having to see lawyers, having to see doctors, that's the only reason that was put in there.

Having already been approached by both about a matter of mutual concern to them, Stamp obviously had a reason to believe Hill and Gunter "were out doing something together," which was confirmed when he saw the OCRC charges dated October 9.

2. Alleged threats and interrogation

On October 28, shortly after the Respondent had received by mail a copy of the charge Hill filed with the OCRC, he was called into the office by Company President Edelman who began criticizing his job performance. The credible and uncontradicted testimony of Hill establishes that Edelman said that he did not like Hill's attitude, that he had been trouble since he started there, that he should have been terminated a long time ago, and that if he did not change his attitude he would be terminated. During the course of the conversation Edelman said that the fact that he was Jewish and Hill was black made them "like brothers" in that both were subjected to discrimination, that Jewish people had it a whole lot harder, but that they rarely complained.

I find that this conversation was the result of the OCRC charge that Hill had filed and the Respondent had received that day. As noted, Edelman did not appear as a witness and the Respondent has offered no explanation as to why this meeting was called.⁴ The timing of an employer's action can be persuasive evidence of its motivation. *Limestone Apparel Corp.*, 255 NLRB 722, 736 (1981). Edelman's comments about the discrimination to which certain ethnic groups have been subjected further suggests that it was learning about Hill's racial discrimination charge that caused him to sum-

³ The amended charges filed with the OCRC on November 4 by Hill and Gunter, alleging retaliation for having filed the original charges, were extensions of the concerted activities they engaged in when they filed the original charges.

⁴ According to Stamp, the only management official to testify, he did not know why the meeting was convened.

mon Hill to his office. Moreover, Edelman's closing statement to Hill that he knew "what you guys are up to and you're going to change your attitude or you're going to be terminated," indicates it was the concerted activity Hill had engaged in that led Edelman to threaten him with termination. I find that this threat violated Section 8(a)(1).

The credible testimony of Hill and Gunter establishes that, on October 31, Supervisor Naves told them he had heard about the charges they had filed and that they had better watch themselves because the company was gunning for them. Naves was not called as a witness and this testimony is uncontradicted. I find that Naves' statements constituted an unlawful threat of unspecified reprisals for having engaged in protected activity and violated Section 8(a)(1).

I credit the testimony of Gunter concerning the conversation he had with Stamp concerning his activity at the the First Street Recycling Center in early November over Stamp's denial. Gunter's testimony about the incident was specific, detailed, and believable. Stamp's denial was in answer to a compound leading question which did not accurately reflect Gunter's testimony about the incident and, as discussed above, I did not believe his testimony concerning the Respondent's not having a rule prohibiting discussion of unions. Gunter testified that Stamp told him he had been observed talking to another employee about unions and showing him some papers. After commenting that Company President Edelman "goes crazy about unions," Stamp asked Gunter if he had been talking about unions. The totality of the circumstances surrounding this incident must be considered pursuant to the Board's decision in *Rossmore House*, 269 NLRB 1176 (1984). I have previously found that the Respondent had an unlawful rule prohibiting its employees from discussing unions punishable by termination. Stamp's inquiry came shortly after Gunter had engaged in a private discussion with another employee at a site remote from the the Respondent's premises, it had no ostensible purpose other than to ascertain whether Gunter had violated the rule against discussing unions, and was prefaced with a reference to Edelman's opposition to unions. I find this constituted a coercive interrogation and violated Section 8(a)(1).

3. Alleged acts of retaliation

The complaint alleges that the Respondent took certain adverse personnel actions against Hill and Gunter because they had engaged in protected concerted activity in violation of Section 8(a)(1). In cases where the employer's motivation for taking certain actions is in issue, those actions must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 800 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once that has been done, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of protected activity on the part of its employees.

There is ample evidence that immediately upon learning of the concerted activity of Hill and Gunter it took action to deter that activity, including, the unlawful threats discussed here. The timing of the threats, the involvement of Edelman

and his statements to Hill concerning his "attitude" and the possibility of termination if that attitude did not change, and Supervisor Naves' contemporaneous warning the the employer was gunning for them, all support the inference, which I draw, that protected activity was a motivating factor in the personnel actions discussed below.

On October 26, Hill was sent home from work in order to shave. The evidence shows that Stamp was aware that Hill has a skin condition that can be irritated by shaving and while he had often been spoken to about shaving he had never before been sent home or prevented from working because he was unshaven. According to the credible testimony of Hill, that same day another driver who had not shaved, Wade Watkins, was allowed to work. When he raised that fact with Stamp, he said he was not concerned about that at the moment. This incident occurred after Hill and Gunter had raised the issue of wage discrimination with Stamp and shortly after their absences on October 9 to file charges with the OCRC, when Stamp suspected they were "out doing something together." The evidence shows that although he had been told to shave on numerous occasions during his entire employment with the Respondent, sometimes for 2 or 3 days in a row, he was never disciplined or prevented from working before this. The only thing that had changed prior to this incident was that Hill had begun to engage in protected activity. I find the evidence establishes that Hill was sent home to shave on October 26 in retaliation for engaging in protected activity. The Respondent has presented no evidence to explain why Hill was treated differently on this occasion or why he was singled out for discipline when another driver who was unshaven was allowed to work that same day. Accordingly, I find that it has failed to establish that it would have taken the same action against Hill in the absence of protected conduct on his part and that its action violated Section 8(a)(1).

The evidence to support the inference that Hill was suspended on November 4 because he had engaged in protected activity is even stronger. By that point, the Respondent had received copies of the OCRC charges, Edelman had called Hill in and threatened him with termination, and Naves had warned him that the Company was gunning for him. When Hill attempted to explain that he had done nothing wrong at OSMI, Stamp said that he could no longer believe him because of "all the stuff that's been going on here," an obvious reference to Hill's protected activity.⁵ The Respondent now admits that Hill had not been asked to pick up an additional container at OSMI on the previous day, as had allegedly been reported to it, and that he had done nothing wrong, yet, it failed to put him back to work immediately on November 4 and paid him for that day only up to the point he had been called to come back to the yard.⁶ In addition, it

⁵I credit Hill's testimony about what was said by Stamp during this incident over Stamp's denial based on their demeanor while testifying and the fact that Stamp's testimony about this and other matters was less than credible.

⁶Apparently, Hill did not go back to work on November 4 after being called to come back to the yard and talk to Stamp (who at that point knew Hill was blameless) because he did not have his work clothes with him. There is no reason why Hill could not have been told he was being put back to work when he was called to come in. It appears the Respondent was attempting to further punish Hill for its own mistake.

took Hill off the OSMI run, which the evidence indicates was a desirable run that he had been assigned for some time. It claims that OSMI was an important customer and it did so in order to avoid friction between Hill and OSMI personnel and because of some other "problems." The other problems involved Hill's alleged failure to put some containers in the right place at OSMI on 2 occasions during October. Although Stamp testified that he had spoken to Hill on both occasions, no disciplinary action was taken against him and he continued to handle the OSMI run. Stamp failed to explain why after twice cautioning Hill for the same type of misfeasance on the OSMI run without removing him from it before he learned of the OCRC charges, he immediately removed him from the run after the November incident even though Hill was blameless. This resulted in his being assigned to other runs each day which involved shorter distances and more arduous duties and were less desirable than his regular OSMI run. Hill testified that he was not aware of any friction between himself and OSMI personnel and the Respondent has failed to establish that any existed. I do not agree with the Respondent's contention that Hill agreed to be taken off the OSMI run because when he was told by Stamp that he being taken off the run, he said "okay." The evidence shows that the decision to remove him from the run had already been made when Hill was informed about it and there is nothing to suggest that Stamp sought his concurrence or that a protest would have done any good. I find that the Respondent has failed to establish that it would have taken the same action in the absence of protected activity on Hill's part. On the contrary, it appears that it used this incident as a pretext for removing Hill from a desirable assignment and assigning him to more onerous duties. By doing so, it violated Section 8(a)(1) of the Act.

4. Reduced hours of work

The complaint alleges that, as a result of the protected activities on the part of Hill and Gunter, the Respondent reduced their hours of work. In support of this allegation, Hill testified that, following the OSMI incident on November 4 until he resigned, he felt he was brought in later and sent home earlier than when he was on the OSMI run. Gunter testified that during his last 2 or 3 weeks of employment he was told to come in to work later than usual at least 3 or 4 times while other drivers with less seniority were starting work earlier. I find this general testimony to be insufficient to establish that the working hours of Hill and Gunter were actually reduced. Stamp testified without objection that he had reviewed the Respondent's records and that the work hours of neither were reduced during this period. More precise and probative evidence should have been readily available either from the Charging Parties' pay records or from the Respondent's payroll records which could have been subpoenaed. No such records were offered as evidence and there was nothing to suggest that they were unavailable.⁷ The General Counsel had the initial burden of proof in establishing that their work hours had in fact been reduced. I find that

the burden has not been carried and shall recommend that these allegations be dismissed.

5. Constructive discharge

Hill resigned from his employment with the Respondent on November 14. He testified that he had already been working part time with another trucking company, he had an offer to work for it full time, and he felt that he should take the job while it was available because he was being harassed for filing wage discrimination charges against the Respondent and feared he might be terminated. Gunter resigned from his employment with the Respondent on November 24 although he did not have other employment. The complaint alleges that both were constructively discharged as a result of the Respondent's retaliation for their having engaged in protected activity.

Under Board law in order to establish a constructive discharge the General Counsel must show that the burdens imposed on the employee cause and were intended to cause a change in working conditions so difficult or unpleasant as to force him to resign and that those burdens were imposed because of the employee's protected activity. *Manufacturing Services*, 295 NLRB 254, 255 (1989); *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976). In the case of Hill, I find that the evidence in the record meets the Board's standard for finding a constructive discharge. It is clear that the retaliatory actions discussed here stemmed from Hill's protected activity in raising the issue of wage discrimination with the Respondent and filing charges with the OCRC. The only question is whether those actions made Hill's working conditions so difficult or unpleasant as to force him to resign. The evidence shows that on learning of Hill's protected activity the Respondent began a campaign of harassment and threats. Although he had a long history of noncompliance with the rule requiring drivers to be clean shaven because of a skin condition, Hill was disciplined for not shaving for the first time, by not being allowed to go to work, shortly after the fact of his protected activity surfaced. A few days later, this incident was used as an excuse by the company president to call Hill into his office for a long discussion of Hill's alleged shortcomings as an employee, followed by threats of termination if he did not change his attitude. I have found this meeting flowed directly from the fact that Hill had filed discrimination charges with the OCRC and was meant to harass him for engaging in protected activity. A few days later, Supervisor Naves told Hill to watch himself because the Company was "gunning" for him. This was corroborated days later when the Respondent shot first and asked questions later. Hill was wrongly accused and suspended for the incident at OSMI, told by Stamp that he could not be trusted because he had filed the charges, and was taken off the OSMI run despite being exonerated. Thereafter, he was given assignments which normally went to less senior drivers, required more physical work, such as, shoveling up overflow scrap and climbing onto the truck to cover containers, that the OSMI job did not, and which he felt were meant to humiliate him. When he resigned he expressed these thoughts to General Manager Clouts who responded only that it "was not his position to get into that." I find that the Respondent's harassment of Hill was intended to make his working conditions so difficult or unpleasant as to force him to leave

⁷ The hearing transcript indicates that the Respondent did introduce some payroll records but it apparently failed to provide copies to the reporter for inclusion in the record.

and resulted in his constructive discharge in violation of Section 8(a)(1). *Daniel's Pallet Service*, 283 NLRB 34 (1987).

I find that the evidence does not establish that Gunter was constructively discharged. It does not establish that his hours were reduced after he filed charges with the OCRC or that his working conditions were significantly changed. I find his testimony about being assigned to the trash detail more often than before, being given runs which were shorter or dangerous and involved more physical work too vague and lacking in detail to establish that he was given assignments that were so difficult or unpleasant as to force him to leave his employment. While he was called into the office and questioned about a delay in completing an assignment about the same time as Edelman called in Hill, unlike in the case of Hill, there was no evidence that any adverse action was taken against him as a result. His interrogation by Stamp and the threat by Naves, while unlawful, did not directly impact on Gunter's working conditions nor did his being told not to bring his tape recorder to the yard. I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Franklin Iron & Metal Corp., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Parties, Ronald L. Hill and John Gunter, were engaged in protected activity when they concertedly complained to the Respondent about possible wage discrimination based on race and subsequently filed discrimination charges with the Ohio Civil Rights Commission.

3. By maintaining rules prohibiting employees from discussing their wages among themselves and from discussing unions the Respondent violated Section 8(a)(1) of the Act.

4. By coercively interrogating an employee about protected activity; and by threatening employees with termination and other unspecified retaliatory action, suspending an employee, and changing an employee's job assignment; because they had engaged in protected activity, the Respondent violated Section 8(a)(1) of the Act.

5. By harassing, changing his working conditions, and constructively discharging Ronald L. Hill because he had engaged in protected activity, the Respondent violated Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action design to effectuate the purposes of the Act.

Having found that the Respondent violated Section 8(a)(1) by suspending Ronald L. Hill on October 26 and on November 4, and by constructively discharging him, I shall recommend that it be required to offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings or other benefits he may have suffered as a result of the discrimination against him, as prescribed in *F. W.*

Woolworth Co., 90 NLRB 289 (1950), plus interest, computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On the findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Franklin Iron & Metal Corp., Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining rules prohibiting employees from discussing wages among themselves and prohibiting employees from discussing unions.

(b) Coercively interrogating employees about protected activity.

(c) Threatening employees with termination or other unspecified retaliatory action because they engage in protected activity.

(d) Harassing and changing employees' job assignments or working conditions because they engage in protected activity.

(e) Suspending and discharging employees because they engage in protected activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rules prohibiting employees from discussing among themselves wages and unions.

(b) Offer to Ronald L. Hill immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings or other benefits he may have suffered as a result of the discrimination against him, plus interest. Backpay and interest due shall be computed in the manner described in the remedy section of this decision.

(c) Remove from its files any reference to the unlawful suspensions and discharge of Ronald L. Hill and notify him in writing that this is being done and that they will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Dayton, Ohio, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated, Washington, D.C. August 3, 1994

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain rules prohibiting our employees from discussing among themselves wages or unions.

WE WILL NOT coercively question our employees about union or other protected activities.

WE WILL NOT harass or threaten our employees with retaliation because they engage in protected activities.

WE WILL NOT change working conditions, suspend, discharge or otherwise discriminate against our employees for engaging in union or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the rules prohibiting our employees from discussing among themselves wages and unions.

WE WILL offer Ronald L. Hill immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his unlawful suspensions and discharge, plus interest.

WE WILL notify him in writing that we have removed from our files any reference to his suspensions and discharge and that they will not be used against him in any way.

FRANKLIN IRON & METAL CORP.